Office-Supreme Court, U.S.
FILED
MAY 20 1985
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-1657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MORTON P. MACLEOD,
Petitioner,

vs.

COUNTY OF SANTA CLARA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD L. CLARK,
County Counsel
ROBERT J. MENIFEE,
Deputy County Counsel
Counsel of Record

County Government Center
Ninth Floor, East Wing
70 West Hedding Street
San Jose, CA 95110
Telephone: (408) 299-2111

Counsel for Respondent.

SPARTAN PRINTING COMPANY, SAN JOSE, CA 95110 (408) 293-3183

BEST AVAILABLE COPY

12 pp

STATEMENT OF QUESTION PRESENTED

Can a governmental regulatory action which places a restriction on the use of property form the basis of a taking claim under the Fifth Amendment in circumstances in which there has been a reasonable exercise of the police power, the property remains marketable, there has been no physical invasion of the property, and there has been no governmental interference with either the reasonable investment-backed expectations of the owner or with the historical use of the property?

TABLE OF CONTENTS

	Page
Question Presented For Review	i
Table Of Authorities Cited	iii
Statement Of The Case	2
Reasons For Denying Certiorari	4
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Agins v. Tiburon, 447 U.S. 255	6
Goldblatt v. Hempstead, 369 U.S. 590	5, 6
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419	5
Mugler v. Kansas, 123 U.S. 623	6
Penn Central Transportation Co. v. New York City, 438 U.S. 104	4, 5

No. 84-1657

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MORTON P. MACLEOD,
Petitioner,

vs.

COUNTY OF SANTA CLARA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioner Morton MacLeod brought this action in the United States District Court for the Northern District of California alleging that respondent County's denial of a permit to conduct a commercial logging operation on 116 acres of petitioner's 8300 acre ranch property constituted a taking under the Fifth Amendment.

As president of a real estate holding company, Triad Capital Management Holding Company, and as president and director of a subsidiary corporation, the Castro-Escondido Ranch Corporation, petitioner was responsible for the purchase in 1974 of a 7,000 acre property known as the Castro-Escondido Ranch. Petitioner anticipated an increase in value, and the property was purchased for $2,700,000 as a long term investment (Pet. App. A, p. 2; Pet. App. B, p. 17). Petitioner did not intend to exploit the timber located on the property, but he did contemplate cattle ranching as an interim use (Pet. App. A, p. 2; Pet. App. B, p. 18). The property had been used by the previous owner for cattle grazing and recreation during his 40 years of ownership (Pet. App. B, p. 17).

On January 1, 1977, under the terms of a separation agreement between petitioner and Triad, petitioner received 100% of the stock of the Ranch Corporation, valued at $1.4 million,[1] and assumed an outstanding mortgage in the amount of $1.7 million on the Castro-Escondido property. (Pet. App. A, p. 2). Subsequently, in November, 1977, petitioner bought the neighboring Bloomfield Ranch together with options on two other parcels for $2.26 million. (Pet. App. B, p. 18).

[1] The sole asset of the corporation was the ranch property.

Petitioner leased out the Castro-Escondido property for cattle grazing in 1975 and 1976 and attempted to run his own cattle operation on the property in 1977. In 1978 and 1979 the entire property was leased out for grazing purposes (Pet. App. A, p. 3).

In September, 1978, petitioner filed a use permit application with respondent for the logging of 2.5 million board feet of timber located on 116 acres of the Castro-Escondido Ranch (Pet. App. B, pp. 21-22). On September 6, 1979, the Santa Clara County Planning Commission heard and denied the use permit application on the basis that the Commission was not satisfied that the adverse impacts identified in the environmental assessment could be mitigated (Pet. App. B, p. 24).

On October 7, 1979, subsequent to the action of the Planning Commission, petitioner sold the entire ranch property to C. M. Trading Company for $7,201,564.[2] The District Court found that the denial of the use permit had reduced the value of the property by approximately $1,000,000 (Pet. App. B, pp. 27-28).

On October 15, 1979, the Santa Clara County Board of Supervisors heard and denied petitioner's appeal from the decision of the Planning Commission on the basis that the logging operation would be detrimental to the public health and safety.[3] Petitioner then filed

---

[2] During petitioner's approximately 2½ years of ownership the property had a 32% increase in value ($5,360,000 to $7,201,564).

[3] The Board of Supervisors found that the proposal presented a significant risk of degradation of water resources, that the introduction of logging trucks into the area would present a significant safety hazard to users of a highway and a neighboring park, and that there would be a significant increase in the risk of fire in the area (Pet. App. B, p. 25).

an action in state court which alleged that the decision of the Board of Supervisors was not supported by substantial evidence and that petitioner had been denied a fair hearing. The trial court rejected petitioner's claims and upheld the action of the Board of Supervisors. After the trial court's decision was affirmed by the Court of Appeal, the Supreme Court denied a petition for hearing (Pet. App. A, p. 4; Pet. App. B, pp. 25-26).

At the conclusion of the state court proceedings, this action was commenced under the provisions of 42 U.S.C. §1983. The District Court held that no taking had occurred and entered judgment for respondents (Pet. App. B, p. 45). The Ninth Circuit Court of Appeal affirmed, placing principal reliance on the decision of this Court in *Penn Central Transportation Co. v. New York City* 138 U.S. 104 (1978).

REASONS FOR DENYING CERTIORARI

The opinion of the Court below is consistent with the standards set forth in this Court's decision in *Penn Central Transportation Company v. New York City* 438 U.S. 104 (1978) and presents no facts which would give rise to a new issue requiring review by this Court.

1. A single parcel cannot be divided into discrete segments in an attempt to determine if a taking has occurred, and a taking claim cannot be based on the mere diminution of value resulting from a reasonable exercise of the police power. *Penn Central*, supra, at 130-131. The permit denial in question affected only 116 out of 8300 acres and resulted in the total property's value being reduced by approximately 12%

($8,200,000 to $7,200,000). Under such circumstances, there is no basis for a taking claim by petitioner.

2. In considering whether there has been a taking, a Court must consider "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, supra, at 124, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594. The regulatory action herein – the denial of a single application for a use permit to conduct a commercial logging operation – did not interfere in any manner with the investment-backed expectations of petitioner. The property was purchased as a long-term investment, with cattle ranching, the historical use of the property, contemplated as an interim use. The fact that petitioner was unable to exploit another use of the property is not sufficient to form the basis of a taking claim.

3. The character of the action also must be taken into consideration. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government [citation omitted] than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, supra, at 124.[4] Although petitioner was not permitted to conduct a logging operation at the expense of the public health and safety, he was free to use the property for other purposes and to prevent

[4] See, also, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1981), which traces the historical development of the distinction between regulation of an owner's use of property and a physical intrusion of such property.

others, including the government, from occupying or otherwise interfering with such use.

4. In light of the sale of the property for $7,200,000, petitioner's premise that the property had no "economically viable use" cannot be supported by either case law or reason.

Sale of property has been recognized as an economically viable use within the meaning of the Fifth Amendment at least since *Mugler v. Kansas*, 123 U.S. 623 (1887), quoted with approval in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), a case involving the prohibition of sand and gravel mining:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, *nor restrict his right to dispose of it*, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest . . ." *Goldblatt*, at 592 (emphasis supplied).[5]

Ultimately, the only true test of economic viability is exposure to the marketplace: if a property has value in the marketplace it has an economically viable use; if it has no value in the marketplace it is without an economically viable use. Irrespective of petitioner's managerial abilities or financial resources, an investor would not have come forward and purchased petitioner's property for $7,200,000 if it was without any economically viable use.

---

[5] See, also, *Agins v. Tiburon*, 447 U.S. 255, 263 n. 9.

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

DONALD L. CLARK
County Counsel

ROBERT J. MENIFEE
Deputy County Counsel
Counsel of Record